Petition

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

HARVEY F. WATKINS,
ROBERT HASLETT,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW:

Whether the court applied the proper standard of proof required to uphold the search of a vessel by customs officers in inland waters when it applied the standard of reasonable suspicion, where the defendants contended that their Fourth Amendment protections from unreasonable searches and seizures were not observed unless probable cause existed at the time that the vessel was stopped.

PARTIES BELOW:

United States of America
Harvey F. Watkins
Robert Haslett
Jose Antonio Hernandez
Allen Hicks, Jr.
Don Gray
Honorio Montanez
Jose Mercado

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Harvey F. Watkins and Robert Haslett petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The opinion of the Fourth Circuit Court of Appeals in this case is attached as Appendix A.

JURISDICTION

On November 5, 1981, the Fourth Circuit Court of Appeals announced its findings in this case. On November 25, 1981, the Court of Appeals filed their Stay of Mandate pending the filing and disposition of this Petition, which Stay was extended upon request of the Defendants. Defendants have not requested an extension of time within which to petition for certiorari.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Title 19 U.S.C. §1581(a) provides, in relevant part, as follows:

> Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs water . . . and examine the manifest and

other documents and papers, and examine, inspect, and search the vessel or vehicle and every part thereof, and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

STATEMENT OF THE CASE

The Petitioners were charged with conspiracy to possess marijuana with intent to distribute, conspiracy to import marijuana into the United States, importation of marijuana into the United States and possession of marijuana with intent to distribute in violation of 21 U.S.C. §§846, 963, 952(a), 960 and 841(a)(1), respectively. The Petitioners filed pre-trial motions to suppress evidence which attacked the constitutional validity of the search and seizure in question under the Fourth Amendment to the United States Constitution. These motions were denied, the Fourth Circuit affirmed their denial, and Petitioners now ask that this Court review the issues presented. Petitioners respectfully submit the following chronology with respect to the "search and seizure" issue presented herein.

On November 13, 1979, police officers of Charleston County, South Carolina, became suspicious of a tractor-trailer which did not have proper exterior identification [Vol. II:208-209]. The Charleston County Police Department learned on November 17, 1979, that the driver of that tractor-trailer was one Honorio Montanez. [Vol. III:91]. On November 19, 1979, Montanez' name was given to United States Customs Officer Kinney, who then asked DEA Agent Cooke to process that name as the owner of the tractor-trailer through the agency's intelligence network. [Vol. II:208-209; Vol. III:33]. Agent Cooke learned that Montanez had been convicted of importing 20 tons of marijuana and the tractor-trailer was placed under continuous surveillance. [Vol. III:33-37].

In the evening of November 19, 1979, DEA Agent Stein was informed that the tractor-trailer was moving north on Highway 17, north of Charleston, and he then surveilled the tractor-trailer from his aircraft. [Vol. II:6]. The tractor-trailer was followed from the air until it reached a wooded area on the property of one Julian Morse, adjacent to the North Santee River, and Stein then

returned to the airport to await further instructions. [Vol. II:43].

Between 15 and 20 government agents followed the tractor trailer to the Morse property as well. [Vol. II:88-89, 228]. The DEA and the United States Customs Service had suspected Julian Morse of being a drug smuggler for many years [Vol. II:31-32, 151; Vol. III:42-43]. DEA Agent Cooke, while on the Morse property, heard the sound of a diesel boat engine in the area where the tractor-trailer had last been seen. [Vol. III:43].

Cooke contacted CPO Kinney and informed Kinney that he had heard a boat motor. [Vol. II:212-13]. Kinney then passed a radio message to SCPO Settles instructing him to scramble a customs boat to the North Santee River area in order to seal off the river. [Vol. II:119, 123; Vol. III:8-9]. CPOs Bell and Daspit and SCPO Settles boarded the customs vessel and proceeded south on the intercoastal waterway at approximately 12:30 a.m. on November 20, 1979. [Vol. II:119].

After conferring with Kinney, McDonald positioned himself in the woods wherein he heard voices and heard a diesel vessel manuevering in the water. He also heard a "thumping" sound, which he believed to be the sound made by bales of marijuana when they hit the floor of a truck [Vol. II:156]. The record does not indicate that Kinney ever informed Settles of what McDonald had heard, nor did Cooke or McDonald ever see a boat with a diesel engine. [Vol. II:293].

Cooke then drove to the airport where he told Stein that a boat had been heard in the area of the tractor-trailer and told Stein to commence surveilling from the air once again, and that a customs boat was en route to the North Santee River area. [Vol. II:13]. Stein flew back to the vicinity of the tractor-trailer and then flew down the Santee Delta towards the ocean, where he reached the intercoastal waterway at approximately 1:30 a.m. on November 20, 1979. [Vol. II:14, 17]. Agent Cooke did not attempt to procure a warrant for either the Morse property or the tractor-trailer prior to leaving the airport, despite the fact that a duty magistrate was on call that night. [Vol. III:74].

Around the same time, the officers who had stationed themselves at the North Santee River bridge radioed Kinney that they had heard what seemed to be a vessel with a large diesel engine. [Vol. II:216]. Settles wanted a further description of the vessel. Kinney testified that he passed along the same informa-

tion that he had received: that it was probably a large boat with a diesel engine. [Vol. II:216]. However, under cross-examination, Kinney stated that the transmission he received from the officers on a bridge only indicated that they had heard what sounded like a large boat, and so Kinney concluded that it was a large boat. The officers, however, never told Kinney that they had actually seen a large boat. [Vol. II:222, Vol. III: 11-12].

Settles' testimony was somewhat different. He testified that he had received a radio transmission from Kinney which indicated that a large vessel was running without lights in the vicinity of the North Santee River bridge at approximately 1 a.m. There was, however, no other testimony that such a transmission ever occurred.

Shortly after Kinney's radio transmission to Settles, Stein saw a light in the river, off the intercoastal waterway, which appeared to be a sailboat anchor light [II:14]. Stein advised the customs boat that he had seen what appeared to be an anchor light on a sailboat [II:14-15). Immediately thereafter, Stein saw another boat's spotlight come on in the intercoastal waterway, south of the anchored boat which had not been visible prior to turning the light on [II:15]. Stein advised the customs boat of this sighting and said, "Well, here's one that wasn't there before, you better check that one first" [II:17].

On cross-examination, Stein indicated that there were patches of ground fog over the intercoastal waterway on the night in question [II:98-101]. He also indicated that the boat that was stopped was approximately fourteen (14) miles down river from the Morse property [II:59]. As to his radio transmissions with the customs boat, Stein testified that he had been communicating with CPO Daspit, and that he did not talk to Settles until after the boat was boarded [II:103]. Stein was then asked:

Q. When you spoke with Daspit, as indicated on Line 1, p. 161 (preliminary hearing transcript), he said back to you, "You got it there?"

A. Yes, sir.

Q. "I will go (to) the boat first and board him." Is that correct?

A. That's right. Meaning the boat that I had just called told him that the search light and everything had come on, not this anchored sailboat up in Minim Creek, which was closer to where he was, the sailboat [II:103-04].

Stein also stated that he did not say anything to Daspit over the radio about running lights [II:107]. Stein further testified that in this type of situation, the customs officers would have stopped and boarded any large vessel that night.

Settles testified that about five minutes after he received the radio transmission from Kinney, the customs boat saw an anchored sailboat near marker no. 4 in the intercoastal waterway [II:12]. He stated:

> We had just taken a look at the sailboat, and by that, I mean we had swung our boats around, took a look at it, and (it) was an anchored sailboat and it really didn't meet the description of what we were looking for. Shortly thereafter, lights suddenly appeared in front of our vessel [II:121].

Settles indicated, however, that he did not have any contact with Stein until after the customs boat saw a spotlight sweeping the bank [II:121]. He stated:

> I saw a spotlight sweeping the bank, and shortly after that, I received a call from Mr. Stein asking us if we saw the spotlight and we were moving toward the vessel. [II:121].

After seeing the spotlight, the customs boat proceeded south to overtake the vessel [II:124]. Settles testified:

A. We overtook the vessel about 1:50 in the morning, and as I remember, as we got up closer and shined our spotlights on the vessel, I noticed the name of the vessel was the HUH? with a question mark, and I noticed several factors about the boat that made me suspicious other than the fact that the vessel did meet the general description of the vessel we were looking for, had been called by Mr. Kinney about.

Q. All right. You were describing what you observed when you approached the HUH?

A. All right. I observed that it was a lobster type vessel. I observed the name HUH?; I noticed there were several, or a profusion of electronic antennas on the vessel, all of them in the down position as if she had been under a bridge of some type. I noticed that there was no fishing rigging or traps of any type on the vessel, and as we got closer, observed that on the bow of the boat was a small zodiac raft, which is fairly unusual to see on a commercial vessel. We made the turn, came alongside the vessel, at which time I got on the bow of the customs vessel, I took out my identification, and hailed the vessel. I asked—I told the captain, "United States customs officers," and I asked him to stop the vessel.

Q. Was the vessel moving at the time?

A. Yes, it was.

Q. In what direction was it moving in?

A. It was headed north.

Q. All right, sir.

A. At that point, we were both headed north.

Q. On the I.C.W.?

A. Yes, sir.

Q. Did the vessel, in fact, stop?

A. The individual in the wheelhouse, Mr. Watkins there, sort of looked at the gentleman who was standing at the bow with the spotlight, Mr. Haslett—I see—and they kind of exchanged glances.

> Again, I called out. I said, "United States Customs. Stop your vessel." The captain at that point, Mr. Watkins, who was in the wheelhouse, bent over and out of sight, and the vessel HUH? speeded up as if it was taking off. I put my credentials away, pulled my weapon out, and when he became visible again, I told him to get his hands up where I could see them. At this point, he stopped the vessel [II:124-26].

Settles then boarded the vessel and saw one large clump of marijuana residue near one of the houser holds [I:127]. He also noticed a washdown pump going on the vessel and water pouring onto the deck of the vessel as it was being cleaned off [II:128]. As he moved around the fishbox of the vessel, he noticed a portable generator which was moving on the deck of the vessel with a power cord running up into the forward hold [II:128]. Defendants Watkins, Haslett, and Hensel were then arrested [II:129].

Under cross-examination, Settles testified that it was he and not Daspit who had the conversation with Stein concerning the sighting of the spotlight [II:130-31]. Settles denied telling Stein, "I will go to the boat first and board him" [II:131]. He claimed that what he said was, "We would go take a look at the vessel and we were on our way to do it then. . .(t)he words, "board" were used later on after I had taken a (closer) look at the vessel" [II:131]. Settles also denicd hearing Daspit say, "I will go (t)o that boat first and board him" [II:132]. Settles further testified that he intended to board the HUH? at the time he first said, "Stop" [II:139]. That was when he meant to exercise his dominion and control to stop the boat [II:139].

When asked about the description that he had referred to in his direct examination; Settles stated that the description was of a large vessel with a big diesel engine [II:142]. After being shown some handwritten notes of two agents who were monitoring the radio transmissions in the customs boat, Settles was asked:

> Q. And when they said you had observed the boat and were going to stop and board it, they were telling the truth, weren't they?

A. Yes, sir.

Q. And you intended to stop and board that boat before you got to the sailboat—you were going to stop and board any boat that fit the description, as you heard it, a large vessel with a diesel engine, weren't you?

A. I was going to stop and look at any vessel that met that description.

I only saw one that night and it was the HUH?.

Q. Right. And stop and look meant, stop, board, and make an inquiry as to identification. That was your intention, as you were heading down there in that Sea Ray at five miles an hour, wasn't it?

A. I wouldn't say so. We stopped and went back later and took a look at those sailboats, and didn't board them.

Q. I understand. But any boat that fit the description of a large vessel with a big diesel engine you intended to stop, board, and check out, didn't you?

A. I may have stopped and looked at his papers, yes sir.

Q. That was your intention, was it not?

A. *My intention was to catch a load of dopers out there that night.*

Q. *Right. And to catch a load of dopers, if you had seen a large fishing vessel with a diesel engine, you intended to stop, board, and check it out, did you not?*

A. Yes, sir. [II:145-47] (emphasis added)

With regard to his report of November 20, Settles admitted that it did not mention at any point that the vessel HUH? had sped up [II:148].

The stipulated testimony of Defendants' expert witness, Glen Ulrich, was presented to the trial court with regard to the type of motor vessels that could be found along the intercoastal waterway in the Charleston and McClellanville, South Carolina area in November [I:65-67]. He classified the intercoastal waterway as a major thoroughfare for boat traffic [I:67].

Ulrich stated that a description of a fishing boat as a "Florida type" usually indicates the type of boat that fishes for snapper and/or grouper, being in the forty to fifty foot class equipped with hydraulic or electric lifting devices or reels for long line fishing and usually of a hull design similar to the Marine Management or Thompson hulls. The location of the cabin on these vessels could be far forward or toward the rear depending on the personal preferences of the owner [I:66].

Ulrich stated that during the month of November, 1979, there were twelve (12) snapper/grouper type fishing boats out of the Charleston area and two (2) of the same type boats fishing out of the McClellanville area [I:66].

As to electronic equipment, Ulrich stated that this type boat would generally have a Loran unit, model C being the latest. The boat would also be equipped with a fathometer, commonly referred to as a fish finder, which would not have an antenna. It would also have a radar unit which would be attached to an antenna. It would not be unusual to see a boat of this type traveling in the intercoastal waterway with its antenna down. Nor would it be unusual to see a snapper/grouper type fishing boat in the intercoastal waterway near the Santee River inlet in the month of November, either during the day or at night. Lastly, it is not at all unusual to have no fishing equipment on deck at night [I:66-67].

ARGUMENT OF REASONS FOR GRANTING THE WRIT

This Petition presents a significant question pertaining to whether the appropriate standard of proof for the search of a vessel by customs officers in inland waters is that of reasonable suspicion or that of probable cause. While defendants contended that the Fourth Amendment required that the customs officers display probable cause, the Court found that the lower standard of reasonable suspicion was applicable. Review of this

determination is necessary because a federal court of appeals has decided a federal constitutional issue incorrectly, and because these Fourth Amendment issues have not been squarely ruled upon by this Court.

A. The Fourth Amendment Rights of the Petitioners Were Violated When Law Enforcement Officers Stopped and Boarded Their Vessel Without a Warrant.

Individuals who sail our nation's waterways are entitled to the same protection under the Fourth Amendment as those using its roads or airspace: freedom from unreasonable stops and searches. *United States v. Whitmire,* 595 F. 2d 1303, 1319 (5th Cir. 1979) (J. Rubin, concurring). This is so because the essential purpose of the proscription in the Fourth Amendment is to impose a standard of "reasonableness" upon the exercise of discretion by government officials, including law enforcement agents, in order " 'to safeguard the privacy and security of individuals against arbitrary invasions...' " *Marshall v. Barlow's, Inc.,* 436 U.S. 307, 312 (1978) (quoting *Camera v. Municipal Court,* 387 U.S. 523, 528 (1967). *Delaware v. Prouse,* 440 U.S. 648 (1979). Therefore, without a warrant, law enforcement officers may not stop, board or search a vessel unless the action is reasonable by Fourth Amendment standards. *United States v. Whitmire, supra* at 1317.

There are three exceptions to the Fourth Amendment's warrant requirement that are potentially applicable here: (1) a border search; (2) a limited investigatory stop upon presence of reasonable suspicion of law violations under *United States v. Brignoni-Ponce,* 442 U.S. 873 (1975); and (3) a customs search pursuant to 19 U.S.C. Sec. 1581(a). However, the analyses below will make clear that the stopping and boarding of the vessel HUH?, which resulted in the arrests of Defendants Watkins and Haslett, did not fall within these exceptions.

1. This Case Does Not Fall Within the Exception of a "Border Search."

This Court has determined that the search of people or things that cross our borders is "reasonable" for Fourth Amendment

purposes even in the absence of probable cause or a warrant by virtue of the fact of a border crossing. *Almeida-Sanchez v. United States,* 413 U.S. 266, 272 (1973). In marine cases, the true border is an imaginary line three (3) miles offshore. Though courts have not required officers to actually observe the vessel as it crossed this imaginary line, *United States v. Ingham,* 502 F. 2d 1287 (5th Cir. 1974), it is required that the officials have specific articulable facts from which they may reasonably infer that the boat has come from international waters, *United States v. Whitmire,* 595 F. 2d 1303, n. 2 & 4 (5th Cir. 1979); *United States v. Acosta,* 489 F. Supp. 61, 63-64 (S.D. Fla. 1980), or that the boat has crossed the border leaving territorial waters. *United States v. Stanley,* 545 F. 2d 661 (9th Cir. 1976). The border search doctrine will validate a complete search of an American vessel if the vessel is shown or reasonably suspected to have come directly from seas beyond the three mile limit. *See, e.g., United States v. Ingham,* 502 F. 2d 1287 (5th Cir. 1974); *United States v. Lonabaugh,* 494 F. 2d 1257 (5th Cir. 1973).

The requirement of a border crossing nexus to justify a warrantless boat search was recently addressed by the Fifth Circuit in *United States v. Whitmire,* 595 F. 2d 1303 (5th Cir. 1979). In *Whitmire,* the government unsuccessfully attempted to uphold the search of the boat NOVA under the border search doctrine. The NOVA had first been spotted on an inlet connecting the ocean to the inland waterway, coming from the ocean side. It was first sighted when it was already inside the shoreline, but as the officers got closer to the NOVA, they saw that the boat was encrusted with salt crystals such as might have been found during an extended ocean voyage. Two men aboard were wearing new sweatshirts with the word "Bimini" printed across the front. The NOVA was boarded, marijuana was found in the cockpit, the defendants were arrested, and, thereafter, the officials found an American Express receipt in one of the defendants' wallet which indicated that he had purchased fuel on Bimini the previous day. The Court held that the facts were insufficient to infer that the boat had recently come from international water, and so the search could not be justified as a border search. *Whitmire, supra* at 1308. *See United States v. Williams,* 544 F.2d 807 (5th Cir. 1977) (no reasonable belief that houseboat fell within customs' area of concern because customs

officers had no evidence that it had entered into international waters or contacted other vessels in such waters); *United States v. Castro,* 596 F. 2d 674 (5th Cir. 1979) (search of boat which had been observed by customs officers only in inland waters could not be upheld as a border search since there had been no known, recent "nexus" to the border); *United States v. Acosta,* 489 F. Supp. 61 (S.D. Fla. 1980).

The facts of this case, like those in *Whitmire,* do not fit a border search analysis. The HUH? was first sighted in the area where the intercoastal waterway crosses the North Santee River [I:96]. It was heading north on the intercoastal waterway [II:141]. There were no facts introduced at trial which would show that the customs officers (Settles, Daspit, and Bell) could have reasonably suspected that the HUH? had recently crossed an international border, either entering or leaving the territorial waters of the United States, nor was there any evidence that the HUH? contacted another vessel in such waters. The border search doctrine cannot be relied upon by the Government to justify the stopping and boarding of the HUH?

2. **This Case Does Not Fall Within the Exception of a "Limited Investigatory Stop."**

Limited investigatory stops for routine document and safety checks without a warrant, or probable cause and exigency, have been held permissible. In *United States v. Brignoni-Ponce,* 422 U.S. 873 (1975), the Court held that officers on roving land patrol may stop vehicles, "if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion (of illegal activity)." *Id.* at 884. *See Delaware v. Prouse,* 440 U.S. 648 (1979). This principle has also been applied to vessels. *See United States v. Serrano,* 607 F. 2d 1145 (5th Cir. 1979); *United States v. Castro, supra; United States v. Acosta, supra.*

An "investigatory stop" as applied to a vessel embraces both stopping and boarding it for a routine document and safety check. *United States v. Williams,* 589 F. 2d 210, 214 (5th Cir. 1979), *aff'd on other grounds,* 617 F. 2d 1063 (5th Cir. 1980) (en banc). To support the initial stop of a vessel, the government must show that such stop was justified by a reasonable suspicion

on the part of the customs officers, pursuant to *United States v. Brignoni-Ponce, supra,* that such vessel was engaged in illegal activity. *Cf. United States v. Frisbie,* 550 F. 2d 335 (5th Cir. 1977) (vehicle stop). For the observations of the officers to constitute grounds for reasonable suspicion, they must have been made prior to the decision to stop the vessel. *United States v. Frisbie, supra* at 338.

The trial court and the Fourth Circuit upheld the stopping and boarding of the HUH? on the basis that the law enforcement officers in the area had a "reasonable suspicion" that the HUH?, a large vessel, might be connected to criminal activity. Defendants respectfully contend that the facts of this case do not support these holdings.

Prior to making the decision to stop the HUH?, the following are the only facts which the government can contend were "suspicious." First, customs officers heard the sound of a diesel engine, although no vessel had been sighted, and secondly, there was a sudden appearance of a boat spotlight. The appearance of the spotlight can hardly be considered suspicious in that the record reflects that there were patches of ground fog on the waterway. Moreover, the customs officers were not aware of the fact that CPO McDonald had heard what he believed was the sound of bales of marijuana hitting the floor of a truck, and, therefore, there was no reason for the customs officers to believe that marijuana had been on board that vessel. A similar question was addressed in the case of *United States v. Stanley,* 545 F. 2d 661, 664 (9th Cir. 1976), where the court found that the search of the vessel O/S NATIONAL was not supported by probable cause because no connection was shown between the vessel and the site of the marijuana transfer. The record shows that it was at the point of the spotlight sighting that the decision had been made to stop and board the HUH? Therefore, it is at this point that the customs officers must have had sufficient grounds to reasonably suspect the HUH? to have been involved in smuggling activity. *United States v. Frisbie,* 550 F. 2d 335 (5th Cir. 1977). The facts then known to the customs officers clearly did not warrant such a suspicion. Rather, the customs boat made a random-type stop of the HUH? It is beyond question that random stops of this nature are unconstitutional. *Delaware v. Prouse, supra; United States v. Harper,* 617 F.2d

35 (4th Cir. 1980).

One of the government's witnesses, SCPO Settles, testified that the decision to stop the HUH? was not made at the time that the spotlight was sighted, but rather, was made as the customs boat proceeded to overtake the HUH?. Even if this Court determines that the decision to stop the HUH? was based on Settles' observations as his boat came close to the HUH?, Petitioners assert that there still were insufficient facts to warrant a reasonable suspicion of criminal activity on the part of the HUH?. Settles testified that he made the following observations as the customs boat approached the Defendants' vessel: (1) that the vessel's name was HUH?; (2) that the HUH? met the *general description* of the vessel that had been heard near the North Santee River bridge; (3) that the HUH? was a lobster-type vessel; (4) that it had a profusion of electronic antennas and they were in the down position, as if it had been under a bridge of some type; (5) that there was no fishing rigging or traps on the deck; and, (6) that a small zodiac raft was on the bow, which he felt was fairly unusual to see on a commercial vessel.

These facts should not have been considered to be "suspicious." The testimony revealed that there were fourteen fishing boats in the Charleston and McClellanville area in November, 1979, one of which was the HUH?. Nor was it peculiar that the HUH?'s antennas were down, that no fishing rigging or traps were observed, and that a Zodiac raft was present. The expert who testified before the trial court noted that it would not be usual for this type of boat to be traveling in the intercoastal waterway with the antennas down. Moreover, the lack of rigging or traps is equally insignificant.

The court in *United States v. Warren,* 550 F. 2d 219, 225 n.5 (5th Cir. 1977), *rev'd on other grounds,* 578 F. 2d 1058 (5th Cir. 1978) (en banc), rejected a similar argument, stating that:

> The government is alleging on appeal that the Coast Guard had probable cause to stop and search the vessel for criminal violations. They base the probable cause on the fact that the shrimp boat was in an area in which no shrimping was done, and also on the fact that the boat did not have its shrimping nets out ready to use. We find this argument totally without merit.

This court should review and disapprove of a stop of this nature, founded upon dubious "suspicious" circumstances of such slight import. To permit this ruling to stand would result in subjecting numerous vessels in the Charleston, South Carolina area to unreasonable detention whenever they travel the inter-coastal waterway at times of the year and at hours of the night when it is less frequented. A decision to travel at night in November should not be constitutionally determinative of the right of customs officers to stop motor vessels. The stopping and boarding of the HUH? should not be upheld under pretext of an investigatory stop. *See United States v. Acosta,* 489 F. Supp. 61, 64 (S.D. Fla. 1980) (boarding of vessel was only a pretext to search for contraband).

3. This Case Does Not Fall Within Any Exceptions Provided by 19 U.S.C. §1581(a).

Customs officers are legislatively authorized, pursuant to 19 U.S.C. Sec. 1581(a), to board and search vessels. That section provides, in relevant part:

> Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs water...and examine the manifest and search the vessel or vehicle and every part thereof, and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

Read literally, this statute grants extremely broad authority. However, strict application of the literal terms of the section to every vessel would "subvert the Fourth Amendment." *United States v. Williams,* 544 F. 2d 807, 810 (5th Cir. 1977) (quoting *United States v. Jones,* 528 F. 2d 303, 304 (9th Cir. 1975).

Consistent with this, the Court in *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973), instructs that an act of Congress cannot validate searches which offend Fourth Amendment stan-

dards. *Id.* at 273. In *Almeida-Sanchez* the Court made the following statement:

> It is not enough to argue, as does the government, the problem of deterring unlawful entry by aliens across long expanses of natural boundaries is a serious one. The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards.

413 U.S. at 273.

A search, therefore, based solely on 19 U.S.C. Sec. 1588(a), is unreasonable in the absence of probable cause or consent, unless it falls within an exception to the Fourth Amendment's prohibition against unreasonable searches and seizures. *United States v. Stanley,* 545 F. 2d 661, (9th Cir. 1976).

Two such exceptions are a border search of a vessel, *see, e.g. United States v. Tilton,* 534 F. 2d 1363, (9th Cir. 1976); *United States v. Ingham,* 502, F. 2d 1287 (5th Cir. 1974), and an investigatory stop of a vessel on inland waters on facts which justify a reasonable suspicion of illegal activity. *United States v. Serrano,* 607 F. 2d 1145, 1148 (5th Cir. 1979); *United States v. Acosta,* 489 F. Supp. 61, 64 (5th Cir. 1980). These exceptions, as pointed out above, are inapplicable to the facts surrounding this case. As a result, the stopping and boarding of the HUH? cannot be justified under Section 1581(a). *See United States v. Williams,* 544 F. 2d 807, 811 (5th Cir. 1977); *United States v. Acosta, supra.*

The stopping and boarding of the HUH? cannot be justified either as a valid border search or as an investigatory stop prompted by reasonable suspicion of law violation under *Brignoni-Ponce.* Since the stopping and boarding of the HUH? was illegal, the customs officers were not lawfully in a position to observe the marijuana residue and, thus, its seizure cannot be upheld under the plain view doctrine. *Coolidge v. New Hampshire,* 403 U.S. 443 (1971). All evidence from the illegal "seizure" of the HUH?, specifically the identities of Defendants Watkins and Haslett and the marijuana residue found on

deck, must be suppressed.

The intrusiveness of searches on the water cannot be minimized by often held beliefs that smugglers form the main class of sailors in whom the approach of officers provoke anxiety. The notion that only lawbreakers need fear unlimited police action is at the root of all police-state rationalizations. The essence of the Bill of Rights is the protection even of wrongdoers. This Court must find that the district court and the Fourth Circuit Court of Appeals were in error in their decision that the search of the HUH? was constitutional.

CONCLUSION

For the aforementioned reasons, and in the interests of justice, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,
GARLAND, NUCKOLLS & CATS, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition for Writ of Certiorari have been furnished to Lionel Lofton, Assistant U.S. Attorney, in the foregoing matter by depositing in the United States Mail a copy of same to the U.S. Attorneys Office, P.O. Box 973; Charleston, S.C. 29402 in a properly addressed envelope with adequate postage thereon.

This the _____ day of December, 1981.

_____

EDWARD T.M. GARLAND

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 80-5065

United States of America,

Appellee,

v.

Harvey F. Watkins,

Appellant.

Appeal from the United States District Court for the District of South Carolina, at Charleston. Robert W. Hemphill, District Judge.

No. 80-5066

United States of America,

Appellee,

v.

Robert Haslett,

Appellant.

APPENDIX "A"

Appeal from the United States District Court for the District of South Carolina, at Aiken. Robert W. Hemphill, District Judge.

No. 80-5067

United States of America,

Appellee,

v.

Allen Douglas Hicks, Jr.
and Don Kimbrough Gray,

Appellants.

Appeal from the United States District Court for the District of South Carolina, at Charleston. Robert W. Hemphill, District Judge.

No. 80-5068

United States of America,

Appellee,

v.

Jose Antonio Hernandez,

Appellant.

Appeal from the United States District Court for the District of South Carolina, at Charleston. Robert W. Hemphill, District Judge.

Argued: February 6, 1981 Decided: November 5, 1981

Before BRYAN, Senior Circuit Judge, SPROUSE and ERVIN, Circuit Judges.

Edward T. M. Garland, Steven H. Sadow (Garland, Nuckolls & Catts, P.C. on brief) for Appellants Watkins and Haslett; Frank Rubino for Appellant Gray; (William Regan on brief) for Appellant Hernandez; (Ronald I. Strauss on brief) for Appellant Hicks; Lionel S. Lofton, Assistant U.S. Attorney (Thomas E. Lydon, Jr., U.S. Attorney on brief) for Appellee.

SPROUSE, Circuit Judge:

Harvey Watkins, Robert Haslett, Allen Hicks, Jr., Don Gray and Jose Hernandez appeal the judgment of the district court, entered after a bench trial, finding them each guilty of all four counts on which they were indicted: conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C. § 846 (count one); conspiracy to import marijuana into the United States, in violation of 21 U.S.C. § 963 (count two); importation of marijuana into the United States, in violation of 21 U.S.C. §§ 952 (a) and 960 (count three); and possession of marijuana with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) (count four).[1]

The appellants advance two principal contentions on appeal: first, that a boat, tractor-trailer, and van were searched in violation of the fourth amendment and second, that there was insufficient evidence to convict them of any of the offenses with which they were charged.

We find that there was no infringement of the appellants' fourth amendment rights and that there was sufficient evidence to sustain the convictions as to counts one and four, conspiracy to possess marijuana and possession with intent to distribute. We agree with the appellants, however, that there was insufficient evidence to convict them of conspiracy to import or importation of marijuana, and therefore reverse the convictions on counts two and three.

Sometime prior to November 19, 1979, Charleston County, South Carolina, police officers became suspicious of a tractor-trailer without proper exterior identification parked at a Howard Johnson's motel near Charleston. They learned that the owner of the tractor-trailer was Montanez, a guest at the

[1] Three other defendants – Honario Montanez, Jose Mercado and Dennis Hensel – were named in the indictment. Prior to trial, Montanez pled guilty, Mercado's case was transferred to Florida under Fed.R.Crim.P. 20, and the government deferred prosecution of Hensel because of an acute illness. Additionally, the entire offload crew pled guilty prior to trial, and two members – Julian Morse and Benjamin Graham – provided testimony for the government. The parties stipulated that this testimony, the testimony adduced at the hearings on the motion to suppress, and the live testimony of Drug Enforcement Administration agent Stein, would constitute the trial record.

motel. United States customs officers and DEA agents in turn were informed of these facts and a check by the DEA through its intelligence network revealed that Montanez had been convicted in Savannah, Georgia of importing 20 tons of marijuana. The tractor-trailer was placed under continuous surveillance, and on the evening of November 19, it was observed leaving the motel and heading north on Highway 17. It was followed by law enforcement officers in cars and an airplane. DEA agent Stein, in the airplane, followed the tractor-trailer to an isolated area near the North Santee River, but was unable to make further observations because it was dark and the tractor-trailer extinguished its lights. Stein advised the other involved law enforcement units of the tractor-trailer's location, checked for boats in the area and, finding none, landed the airplane at Georgetown Airport.

The river property where the tractor-trailer was parked belonged to Julian Morse, who had been a drug-smuggling suspect for approximately five years. DEA agent Cooke was the first law enforcement officer to arrive there. After hearing sounds which he thought to be a diesel boat engine, he conferred with customs officers Kinney and McDonald. McDonald then positioned himself in the woods near the Morse property. He heard voices and a diesel vessel maneuvering in the water, but neither he nor Cooke saw a boat there. He also heard a "thumping" sound, which he thought to be the sound of bales of marijuana as they hit the floor of a truck.

Kinney radioed customs officer Settles, instructing him to scramble a customs boat to the North Santee River area, in order to seal off the river. Cooke told Stein that a boat had been heard in the area of the tractor-trailer, and requested him to reactivate the air surveillance in order to identify the boat and its activity. Stein flew back to the vicinity of the tractor-trailer, and down the Santee Delta. He reached the confluence of the North Santee River and the intercoastal waterway around 1:30 a.m. on November 20.

Stein then advised Settles, in the customs boat, that he had seen what appeared to be an anchor light on a sailboat. Immediately thereafter, he saw another boat's spotlight come on in the intercoastal waterway, south of the anchored sailboat, and approximately 14 miles downriver from the Morse property.

Stein advised Settles of this sighting, suggesting Settles check it first.

The customs boat proceeded south to overtake the vessel after the spotlight was seen. Settles saw the name *HUH?* on the vessel, and observed that it was a snapper or lobster boat. He noticed there were several antennas on the vessel, all in the down position as though she had recently been under a bridge. He also noticed that there was no fishing rigging or traps of any type on the vessel and that a small zodiac raft was on the bow of the boat. Settles identified himself as a "United States customs officer" and asked the captain to stop the vessel. The *HUH?* instead speeded away. Settles drew a weapon and commanded the man in the wheelhouse (later determined to be Watkins) to raise his hands. Watkins stopped the vessel. Settles boarded and observed the crew in the process of washing away marijuana residue. The occupants of the boat, Watkins, Haslett and Hensel, were then arrested.

The information about the marijuana residue found on the *HUH?* was radioed to Cooke who was still near the Morse property. Cooke concurrently received a communication from McDonald that a tractor-trailer and a black van were exiting the Morse property. Kinney and Cooke followed the van and the tractor-trailer in two separate vehicles. Kinney stopped the tractor-trailer, and Cooke stopped the van approximately one mile ahead as both were traveling on Highway 521. All three occupants of the tractor-trailer, Montanez, Mercado and Hernandez, were handcuffed and frisked at gunpoint by Kinney and other law enforcement officers. Residue was found on the rear bumper of the tractor-trailer. After it was field-tested and found to be marijuana, Kinney opened the inspection doors of the trailer and searched inside, finding marijuana bales.

Cooke stopped the van, arrested the occupants, Hicks and Gray, and searched the interior. There is conflicting testimony as to whether these arrests and the search of the van were prior to or after learning that the tractor-trailer was loaded with marijuana. The search disclosed marijuana residue on the van floor.

After the stopping of the tractor-trailer and the black van, McDonald returned to the Morse property where Julian Morse and the entire offload crew were departing the scene.

The parties stipulated that Morse would have testified that he

met defendant Honario Montanez in the summer of 1979 and that Montanez came to his house on either November 15 or 16, 1979, to determine if the tractor-trailer would be able to get onto his property near McClellanville, South Carolina; that he (Morse) was to provide the local knowledge of the area and provide a crew to offload the marijuana; that he hired seven persons, including Benjamin Graham, as the crew and they were to be paid between $10,000 and $50,000 each; that the vessel which Benjamin Graham met at the sea buoy near Winyah Bay, South Carolina (stipulated to be within three miles of the South Carolina coast), arrived at his property on the North Santee River and its marijuana offloaded, loaded into a pickup and van, and then transferred to Montanez's tractor-trailer; and that Don Gray drove the black van onto his property on the evening of November 19, 1979.

It was also stipulated that Benjamin Graham would have testified that he was hired by Julian Morse to be a part of Morse's offload crew for a shipment of marijuana being smuggled into South Carolina; that on the evening of November 19, 1979, he and Alan Hicks, Jr., met a vessel near the sea buoy off Winyah Bay, South Carolina between 3:00 and 4:00 p.m., and then at dark led the vessel down the intercoastal waterway to Morse's property on the North Santee River; that the marijuana was offloaded from the vessel into a pickup and van and then transferred into Montanez's tractor-trailer; and that he did not know any of the crew members aboard the vessel which brought the marijuana onto the Morse property.

I.

Appellants' first contention is that the warrantless searches of the *HUH?*, the tractor-trailer and the van violated their fourth amendment right to be free from unreasonable searches and seizures.

A.

Individuals on boats and ships, of course, are entitled to fourth amendment protection against unreasonable stops and searches. Reasonableness, however, is inevitably measured by

the nature and circumstances of each investigation. A seagoing vessel as well as a land vehicle may be properly searched by officers without a warrant under *Carroll v. United States*, 267 U.S. 132 (1925),[2] whenever there is both probable cause—"the facts and circumstances within [the officers'] knowledge, and of which they had reasonably trustworthy information, were sufficient in themselves to warrant a man of reasonable caution in the belief that [contraband] was being transported in the [vessel] which they stopped and searched"—and exigent circumstances—"it is not practicable to secure a warrant because the [vessel] can be quickly moved." *Id.* at 162, 153.

In addition, 19 U.S.C. § 1581 provides in pertinent part:

> (a) Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under the Anti-Smuggling Act, or at any other authorized place, without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.
>
> . . .
>
> (e) If upon the examination of any vessel or vehicle it shall appear that a breach of the laws of the United States is being or has been committed so as to render such vessel or vehicle, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel or vehicle, liable to forfeiture or to secure any fine or penalty, the

[2] *Carroll* has been cited as authority to search ships without a warrant in other cases. *See e.g., United States v. Hensler*, 625 F.2d 1141 (4th Cir. 1980), *cert. denied*, 101 S.Ct. 1513 (1981); *United States v. Williams*, 617 F.2d 1063 (5th Cir. 1980); *United States v. Weinrich*, 586 F.2d 481 (5th Cir. 1978), *cert. denied*, 441 U.S. 927 (1979).

same shall be seized and any person who has engaged in such breach shall be arrested.

The stop of the *HUH?* was permissible under both 19 U.S.C. § 1581 and the *Carroll* exigent circumstances exception.

A simple reading of section 1581 suggests an extremely broad grant of authority to customs officers to stop and search vessels at any place in the United Staes or in customs waters. Appeals courts directly facing the issue, however, have indicated that the freedom of customs officers to act without warrant or reasonable suspicion is limited to boardings for routine safety and document checks of vessels within customs waters or initially sighted within customs waters and followed into intercoastal waterways prior to boarding. *United States v. Whitaker,* 592 F.2d 826 (5th Cir.), *cert. denied,* 444 U.S. 950 (1979); *United States v. Freeman,* 579 F.2d 942 (5th Cir. 1978). Customs waters are defined in 19 U.S.C. § 1401(j), as to an American vessel, as "the waters within four leagues [12 nautical miles] of the coast of the United States," and do not include inland waters inside the coastline. Only one court has addressed the question of whether an investigatory stop of a vessel in inland waters may be made under section 1581 with less than reasonable suspicion to believe a customs violation has been committed. It answered in the negative, although without basing its holding on fourth amendment grounds. *United States v. Acosta,* 489 F. Supp. 61 (S.D. Fla. 1980).

Other cases have held, however, that a stop of a vessel in inland waters under section 1581 passes fourth amendment scrutiny if the customs officers have reasonable suspicion of a customs violation. *United States v. Serrano,* 607 F.2d 1145 (5th Cir. 1979), *cert. denied,* 445 U.S. 965 (1980); *United States v. Kleinschmidt,* 596 F.2d 133 (5th Cir. 1979); *United States v. Whitmire,* 595 F.2d 1303 (5th Cir. 1979), *cert. denied,* 448 U.S. 906 (1980). Since we hold that there was reasonable suspicion to believe that the *HUH?* had committed or was committing a customs violation, we need not address the question of whether a stop can be made in inland waters without reasonable suspicion.

Prior to stopping the *HUH?*, Settles knew that a convicted smuggler had been identified and his tractor-trailer rig followed

to the coastal property of a suspected drug smuggler. Law enforcement officers near the Morse property reported hearing a diesel vessel maneuvering in the North Santee River and a thumping sound which, from their experience, they thought to be bales of marijuana being loaded into the tractor-trailer. Shortly after the vessel departed the area, the tractor-trailer and a black van also left the property. The vessel *HUH?*, when first spotted, had no running lights and was only intermittently using a spotlight. When the customs boat approached the *HUH?*, Settles noticed that there was no fishing rigging or traps on the vessel, although it was a fishing boat, and that there were several electronic antennas all in a down position as if the boat had been under a bridge. The stopping and boarding of the vessel *HUH?* under these circumstances followed a reasonable suspicion of a customs violation. Moreover, the initial evasive action of those aboard the *HUH?* when Settles attempted to stop her and the marijuana residue in plain view gave more than probable cause to search it.

B.

The DEA agents, customs officers and county police officers surveilling the van and the tractor-trailer after their departure from the Morse property were aware of the identity of the owner of the truck, that its arrival and departure corresponded with the presence of a diesel vessel, and all of the facts developed from the search of the *HUH?*. All of this provided a reasonable suspicion that the van and tractor-trailer were involved in illegal activity and justified the stop. *See Terry v. Ohio,* 392 U.S. 1 (1968); *United States v. Brignoni-Ponce,* 422 U.S. 873 (1975). After the stop of the tractor-trailer, the officers observed and identified marijuana on its rear bumper, giving probable cause to search the interior. *Carroll, supra.*

Viewing the evidence in the light more favorable to the government, *Glasser v. United States,* 315 U.S. 60 (1942), it was only after the discovery of the bales of marijuana in the trailer that the van was searched. The tractor-trailer and the van being present where contraband was apparently loaded and their traveling together in an apparent convoy over the back roads in a circuitous route provided reasonable suspicion for stopping

the van and that, together with the discovery of the bales of the marijuana in the tractor, provided probable cause for searching the interior of the van. Under these circumstances, the fact that a search warrant for the tractor-trailer might have been obtained earlier does not tarnish either search. *Chambers v. Maroney,* 399 U.S. 42 (1970); *United States v. Newbourn,* 600 F.2d 452 (4th Cir. 1979). The officers had probable cause to search both the tractor-trailer and the van and the justification for the search arose suddenly. The searches, therefore, were valid. *United States v. Milhollan,* 599 F.2d 518 (3d Cir.), *cert. denied,* 444 U.S. 909 (1979); *United States v. Patterson,* 492 F.2d 995 (9th Cir.), *cert. denied,* 419 U.S. 846 (1974).

II.

Appellants' second contention on appeal is that there was not sufficient evidence to convict them of any of the four counts.

A.

All of the defendants were convicted of conspiracy to possess marijuana and possession of marijuana with intent to distribute. To prove a conspiracy to possess marijuana with intent to distribute, the government must show the existence of an agreement to effectuate a criminal act. *United States v. Laughman,* 618 F.2d 1067 (4th Cir.), *cert. denied,* 447 U.S. 925 (1980); *United States v. Peterson,* 524 F.2d 167 (4th Cir. 1975); *cert. denied,* 423 U.S. 1088 (1976). The existence of the agreement, however, need not be proven by direct evidence, but may be inferred from the facts and circumstances of the case. *Laughman, supra.* The trial court was well within its factfinding province in inferring that there was a conspiracy among at least some of the defendants to possess the marijuana with an intent to distribute it. The evidence establishes that more than eleven tons of marijuana was delivered by boat to the Morse property where a crew of eight men, under cover of darkness, offloaded it into a van and subsequently transferred it into a tractor-trailer, both vehicles then exiting the Morse property. Some, if not all, of the participants who were on the vessel *HUH?,* on shore unloading the obviously illegal cargo and transferring it to

the van and truck, and driving away, were of necessity parties to a common planned operation.

To convict an individual defendant of conspiracy, of course, requires more than merely establishing the existence of a conspiracy. The government must also prove each defendant's knowledge of the conspiracy's purpose and some action indicating his participation. *Laughman, supra; United States v. Prince,* 515 F.2d 564 (5th Cir.), *cert. denied,* 423 U.S. 1032 (1975). In the case *sub judice,* marijuana residue was found aboard the *HUH?*. The *HUH?,* a lobster vessel, had little fishing equipment and was running after dark without lights. Moreover, the *HUH?* speeded up when customs officer Settles asked it to stop, and the crew was attempting to wash marijuana residue from the boat. The district court could reasonably infer from these facts, and the other subsequently developed facts, that Watkins and Haslett, two of the three men aboard, were aware of the presence of the marijuana and were participating in the conspiracy to possess and distribute it.

The participation of Hernandez in the conspiracy was adequately established by evidence pertaining to the tractor-trailer. It belonged to a convicted drug smuggler, was driven to the Morse property immediately prior to the time the offloading took place and left immediately thereafter. After residue found on the rear bumper of the tractor-trailer was determined to be marijuana, the trailer was searched and marijuana bales found therein. Qualitative inferences similar to those drawn by the court in *Laughman,* in considering the vehicles transporting the marijuana there, can be drawn here: The driver of a vehicle has knowledge of the contraband it contains and this knowledge can also be imputed to the passengers because of their relationship to the driver and other probative circumstances.

It was stipulated that Hicks met a vessel transporting a large quantity of marijuana, off the South Carolina coast and led it down the intercoastal waterway to the Morse property. It was also stipulated that Gray drove the van onto the Morse property and that a van was used to offload the marijuana from the vessel and transfer it to Montanez's tractor-trailer. The van in which Hicks and Gray were riding left the Morse property with the tractor-trailer and traveled in close proximity to it. This was more than sufficient evidence under *Laughman* to connect

Hicks and Gray to the conspiracy to possess marijuana with an intent to distribute.

The trial court was also correct in holding there was sufficient evidence to convict the appellants of possession with intent to distribute. It was established that the defendants were each participants in a conspiracy to possess and distribute marijuana. Actual possession of the marijuana is not a prerequisite to finding each guilty of the substantive charge of possession with intent to distribute. Constructive possession is sufficient. This exists when each defendant exercises, or has the power to exercise, dominion and control over the item. *Laughman, supra.* Additionally, possession of a large amount of marijuana among several people working together may be sufficient to show that each has constructive possession. *United States v. Gomez,* 529 F.2d 412 (5th Cir. 1976).

In the case *sub judice,* the judge sitting as a factfinder could reasonably have believed that Watkins, Haslett and Hensel brought 23,000 pounds of marijuana in the *HUH?* onto the Morse property, that the marijuana was offloaded into a van driven by Hicks and Gray, subsequently transferred to a tractor-trailer, and transported from the Morse property over the back roads of South Carolina by Hernandez, Montanez and Mercado. At some stage of the transaction, each defendant had the power to exercise dominion and control over the marijuana such that he could have distributed it as he chose. Although Hicks and Gray protested that the bales of marijuana were found in the tractor-trailer while they were in the van, it would be incredible that they and those in the tractor-trailer were not a team exercising joint control over the marijuana. The totality of the evidence establishes one continuous operation, mutually executed by all five appellants with the assistance of others, for transporting marijuana onto and from the Morse property.

B.

However, the convictions of the appellants of conspiracy to import and importation of marijuana (21 U.S.C. §§ 963, 952(a) and 960) cannot stand. A defendant may not be convicted of importation of a controlled substance in violation of 21 U.S.C. §§ 952(a) and 960, unless it is proved beyond a reasonable doubt

that the controlled substance taken from the defendant emanated from a point outside the United States and that the defendant brought it into the United States. *United States v. Soto,* 591 F.2d 1091 (5th Cir.), *cert. denied,* 442 U.S. 930 (1979), *cert. denied,* 421 U.S. 912 (1975). Although it is not necessary to prove that the defendants have been observed bringing the controlled substance into the United States, there must be some proof of importation. *United States v. Miranda,* 593 F.2d 590 (5th Cir. 1979). There is scant, if any, evidence in this case that the marijuana found in the vessel *HUH?* and the tractor-trailer was imported from a place outside the United States by any of the defendants. The vessel led in by Graham and Hicks was met at a sea buoy within three miles of the South Carolina coast. Stein admitted on cross-examination that the *HUH?* was too small to have made the trip from Columbia (where the marijuana allegedly originated) and there was no evidence that a larger vessel was involved. It is true that Stein stated an opinion that the marijuana was baled in Columbia. He did not qualify as an expert, however. His lay testimony identifying the bales as being similar to those he had seen from Columbia during his service as a drug enforcement officer was admissible, but, standing alone, was not sufficient to prove criminal importation.

The judgment of the district court finding the appellants guilty of counts 1 and 4 is affirmed; the judgment finding appellants guilty of counts 2 and 3 is reversed.

AFFIRMED IN PART
REVERSED IN PART.

Opposition

Office - Supreme Court,
FILED
FEB 5 1982
ALEXANDER L. STEVA
CLERK

No. 81-1228

In the Supreme Court of the United States

OCTOBER TERM, 1981

HARVEY F. WATKINS AND ROBERT HASLETT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Fourth Amendment permits Customs officers to board a vessel on inland waters, based on a reasonable suspicion of a violation of law.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1228

HARVEY F. WATKINS AND ROBERT HASLETT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-14) is reported at 662 F. 2d 1090.

JURISDICTION

The judgment of the court of appeals was entered on November 5, 1981. The petition for a writ of certiorari was filed on December 31, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a bench trial in the United States District Court for the District of South Carolina, petitioners were convicted of conspiracy to possess marijuana with intent to distribute it (21 U.S.C. 846); possession of marijuana with intent to distribute it (21 U.S.C. 841(a)(1)); conspiracy to import marijuana into the United States (21 U.S.C. 963); and

importation of marijuana (21 U.S.C. 952(a)). Petitioner Watkins was sentenced to four years' imprisonment, to be followed by a seven-year special parole term. Petitioner Haslett was sentenced to three years' imprisonment, to be followed by a five-year special parole term. On appeal, the court of appeals reversed petitioners' convictions on the importation counts but affirmed as to the possession counts (Pet. App. A-1 to A-14).

1. The evidence at trial, which is set out in the opinion of the court of appeals (Pet. App. A-4 to A-7), showed that in November 1979, petitioners, along with co-defendants Allen Hicks, Jr., Don Gray, Jose Hernandez, Honario Montanez, Jose Mercado, Julian Morse, and Benjamin Graham, conspired to distribute more than 11 tons of marijuana.[1] Their scheme was thwarted when Customs and DEA agents intercepted the marijuana shortly after it had been unloaded from petitioners' boat.

On November 13, 1979, Charleston County, South Carolina, police officers became suspicious of a tractor-trailer parked at a Charleston motel because the rig lacked proper identification (Pet. App. A-4; I C.A. App. 37).[2] The officers checked with DEA agents, who determined that the truck was owned by co-defendant Montanez, then recently convicted of importing 20 tons of marijuana (Pet. App. A-4 to A-5). Surveillance was set up on the truck, and when it left the motel on the evening of November 19, police and DEA agents followed it to a property along the North Santee River owned by co-defendant Morse, who had been suspected of drug smuggling for many years (*id.* at A-5).

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[1]Hicks, Gray, and Hernandez were convicted on all four counts at trial. The court of appeals likewise reversed their convictions on the two importation counts (Pet. App. A-13 to A-14). Montanez, Mercado, Morse, and Graham pleaded guilty prior to trial; Morse and Graham testified for the government.

[2]"C.A. App." refers to the appendix in the court of appeals.

A Customs officer surveilling the Morse property heard voices and the sounds of a diesel vessel maneuvering in the water, but he could not see a boat. The officer also heard sounds that he thought to be bales of marijuana hitting the floor of a truck. As a result, aerial surveillance of the immediate region was instituted (Pet. App. A-5). A DEA agent flying the aircraft located the spotlight of a boat some 14 miles downriver from the Morse property. He reported this discovery to Customs officers who were on a craft on the river (*id.* at A-5 to A-6).

The Customs boat overtook the vessel, which turned out to be a snapper or lobster boat named the *HUH?* (Pet. App. A-6). Customs Officer Settles noticed that the vessel's antennas were all lowered as if the craft had recently passed under a bridge. He also noticed that there were no lobster traps or fishing rigging on the boat, and that a small raft was on the boat's bow (*ibid.*). Settles identified himself and asked the captain to stop the vessel. The *HUH?* did not accede to this request but instead sped away. The Customs boat again overtook the *HUH?*; Settles drew a weapon and ordered the man in the wheelhouse—petitioner Watkins—to raise his hands. Watkins stopped the boat and complied. Settles then boarded the boat and saw the crew attempting to wash away marijuana residue. The boat's occupants, including petitioners, were arrested (*ibid.*).

Settles radioed other Customs officers on shore concerning the discovery of the marijuana residue. A black van and Montanez's tractor-trailer, which were then leaving the Morse property, were stopped. Marijuana residue was found on the rear bumper of the tractor-trailer. A subsequent search of the trailer revealed some 23,000 pounds of marijuana in bales. The van contained marijuana residue (Pet. App. A-6).

2. Prior to trial, petitioners moved to suppress the marijuana residue found on the *HUH?* on the ground that the boarding violated the Fourth Amendment. The district court denied the suppression motion (I C.A. App. 35-55). The court of appeals affirmed, holding that the boarding of the vessel was supported by a reasonable suspicion that a customs violation was occurring, and that, once aboard the boat, Customs Officer Settles observed the marijuana residue in plain view (Pet. App. A-7 to A-10).

ARGUMENT

Petitioners contend that the boarding of their vessel by Customs officers on inland waters violated the Fourth Amendment because it was not supported by reasonable suspicion. The court of appeals correctly held, however, that reasonable suspicion was present here. This fact-bound issue does not warrant further review.

As the court below recognized (Pet. App. A-9 to A-10), the circumstances existing prior to Customs Officer Settles' boarding of the *HUH?* amply furnished reasonable suspicion that a customs violation was occurring. Settles knew that a tractor-trailer owned by a convicted drug smuggler had been traced to a riverfront property owned by a suspected drug smuggler. Officers conducting surveillance near that property heard a diesel vessel maneuvering in the river; they also heard a thumping noise, which sounded as if bales of marijuana were being loaded onto a truck. Moreover, when it was first spotted, the *HUH?* was operating without running lights and was using its spotlight only intermittently. Settles also noticed that although the boat was designed for fishing, it bore no rigging for fishing or traps for lobsters, and its antennas were all in a lowered position. In addition, when Officer Settles initially attempted to stop the vessel, it sped away.

These circumstances clearly provided, at the very least, reasonable suspicion of a customs violation so as to justify the boarding. The courts of appeals consistently have upheld boardings of vessels on inland waters on the basis of a reasonable suspicion of a violation of law. See, *e.g.*, *United States* v. *D'Antignac*, 628 F. 2d 428, 434 (5th Cir. 1980), cert. denied, 450 U.S. 967 (1981); *United States* v. *Serrano*, 607 F. 2d 1145, 1148-1149 (5th Cir. 1979), cert. denied, 445 U.S. 965 (1980); *United States* v. *Kleinschmidt*, 596 F. 2d 133, 135-136 (5th Cir.), cert. denied, 444 U.S. 927 (1979); *United States* v. *Castro*, 596 F. 2d 674, 676 (5th Cir.), cert. denied, 444 U.S. 963 (1979); *United States* v. *Whitmire*, 595 F. 2d 1303, 1308 (5th Cir. 1979), cert. denied, 448 U.S. 906 (1980).[3] Finally, the court below correctly concluded that the marijuana residue was in plain view of Officer Settles after he had lawfully boarded the boat.

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[3]Because reasonable suspicion clearly was present here, there is no need for the Court to hold this petition pending disposition of our petition for a writ of certiorari in *United States* v. *Villamonte-Marquez*, No. 81-1350 (filed Jan. 18, 1982), which presents the question whether the Fourth Amendment permits suspicionless customs boardings of vessels on inland waters pursuant to 19 U.S.C. 1581 and 46 U.S.C. 277 for the purpose of inspecting the vessels' documents. Indeed, the court of appeals in this case concluded that because "there was reasonable suspicion to believe that the *HUH?* had committed or was committing a customs violation," it was not necessary to "address the question of whether a stop can be made in inland waters without reasonable suspicion" (Pet. App. A-9).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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